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No. 94-15

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In the Supreme Court of the United States

OCTOBER TERM, 1994

WATERGATE AT LANDMARK CONDOMINIUM, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether statements showing age-based bias made by the employer's agents who participated in and influenced the employment decision were properly admitted at trial of claims under the Age Discrimination in Employment Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 24 F.3d 635. The opinion of the district court (Pet. App. 14a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1994. The petition for a writ of certiorari was filed on June 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a condominium complex located in Alexandria, Virginia. The complex is managed by a volunteer Board of Directors made up of unit owners. The Board delegated authority to make employment decisions to petitioner's General Manager. The Board also functions through various committees that address particular areas of condominium life. In 1989, the Recreation Committee decided that petitioner's Racquet Club needed to be "reorganized" and "rejuvenated," and the Board, acting on that recommendation, established a Reorganization Committee. Pet. App. 2a-3a. The ensuing reorganization resulted in the discharge of 63-year-old Melvina Nozick, who had been Director of the Racquet Club since it opened in 1976. *Id.* at 6a. The Equal Employment Opportunity Commission (EEOC) challenged that discharge as age-based in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*

There was direct evidence at trial that David Cearnal, a member of both the Reorganization Committee and the three-person interview committee that selected Nozick's replacement, sought to discharge her because of her age. He testified: "I know for a fact that she [Nozick] is not what the residents want. This is not what we went through the reorganization—you know, you have got to resolve that so we can achieve the objectives of what the reorganization was all about." 4/28/93 Tr. 237-238. Between February and August of 1990, Cearnal repeatedly said that he wanted "someone younger for a manager of the racket [sic] club," and that "Mrs. Nozick didn't fit their idea of someone that was young." Pet. App. 6a; C.A. App. 190-191, 193. The remarks about seeking a younger person were overheard by Boyd

Clayton, then a receptionist at the Racquet Club. The district court allowed Clayton to testify over petitioner's hearsay objection because Cearnal acted as an agent of petitioner in the challenged employment decision. C.A. App. 187-188.

Other evidence of age-related comments included statements by Jack Armistead, a member of the Recreation Committee, William Volmer, chairman of the Tennis Committee, and Nicholas Jabinsky, a resident tennis player. Racquet Club receptionist Pamela Grimmett testified that on May 5, 1990, Jack Armistead told her that Nozick "would be leaving" and that "they were going to get somebody younger in there to work." C.A. App. 274-278. Clayton testified that he heard Volmer and Jabinsky tell Cearnal that they "would also like to see someone younger" as Director of the Racquet Club. *Id.* at 192. Based on Armistead's role on the Recreation Committee, the district court held that he, too, was a limited agent, and overruled petitioner's objection to his statements. *Id.* at 188-189. Petitioner did not object to the testimony regarding Volmer and Jabinsky. *Id.* at 192.

Other circumstances surrounding Nozick's discharge also supported the claim that the decision was discriminatory. The Reorganization Committee, seeking to "rejuvenate" the Racquet Club, recommended that Nozick's Director job be divided into two positions: Manager and tennis professional. Nozick expressed her willingness to give up her role as tennis professional in order to continue as Manager. Pet. App. 4a. The tennis professional duties had been relatively minor, amounting to only four hours per week in 1990, C.A. App. 47, and the duties of the new Manager position were otherwise identical to those Nozick had performed as Director. Pet. App. 4a. Nonetheless, the Board denied Nozick the

right of first refusal to the "new" manager position, and advertised it as a job vacancy. *Ibid.*; C.A. App. 111-112.

Nozick applied for the Manager position. The three top applicants included Nozick and two substantially younger candidates. Pet. App. 4a. An interview committee comprised of Cearnal and two of petitioner's paid staff, General Manager Petrine Squires and the Activities Director, Vicky Paulson, interviewed the three candidates. *Ibid*; C.A. App. 117. The interviewers rated each candidate, and Nozick received the highest score from two of the interviewers, and the highest overall rating. Pet. App. 4a; C.A. App. 487-495. Cearnal, however, ranked Nozick last. Pet. App. 4a; C.A. App. 496.

During the interview, Nozick was told that, as manager, she would not be able to give private lessons or make personal use of the tennis courts. Pet. App. 4a-5a. The other candidates were not informed of any such restrictions. *Ibid.*; C.A. App. 88-90; 4/28/93 Tr. 137-138. Nozick protested that, as a resident of the condominium who paid fees for the privilege of using the facilities, including the Racquet Club, she should be able to play tennis there on her own time. Pet. App. 5a; C.A. App. 38-39. Squires said she would check into the matter. Pet. App. 5a. Nozick then wrote Squires a letter explaining that she would not teach on the courts or otherwise use them during work hours, but did want to reserve the right to play there on her own time. *Ibid.*

On August 28, 1990, while Nozick was out of town at the National Tennis Conference, the Board voted not to permit the Racquet Club Manager to use the facilities even on her own time. The Board was then aware that Nozick was the only one of the three candidates who was also a resident of the complex, so that extension of the prohibition to the Manager's own time would deprive her alone of existing privileges. Pet. App. 5a n.2; C.A. App.

175. On August 30, 1990, without determining whether Nozick would accept the additional restriction, Squires offered the job to 23-year-old Christina Moore. Pet. App. 5a. On September 30, 1990, Nozick was discharged. *Ibid.*

Nozick was, however, asked to orient Moore to the job. C.A. App. 44-45. When Moore expressed her eagerness to use the courts after work, Nozick informed her of her understanding that the Manager could not use the facilities, and recommended that she check with management. *Id.* at 45. When management, faced with an embarrassing inconsistency, stated that a restriction on court use also applied to Moore, she resigned. *Id.* at 89-90; Pet. App. 5a. The job was then offered not to Nozick, but to 41-year-old Paulson, petitioner's Activities Director, who had not interviewed for the position. Pet. App. 5a.

Petitioner never inquired whether Nozick would forgo personal use of the Racquet Club, even though the General Manager acknowledged that Nozick was the most qualified candidate, and asserted that she would have been offered the job had she been willing to accept the restriction. C.A. App. 131-132. Paulson was hired at a yearly salary close to $25,000, after Squires had asked Nozick if she would accept $22,000. Pet. App. 5a; C.A. App. 287.

On February 7, 1991, Nozick filed a discrimination claim with the Equal Employment Opportunity Commission. PX 1, C.A. App. 292-293. The EEOC conducted an investigation, and determined that petitioner had discharged Nozick based on her age in violation of the ADEA. PX 3, C.A. App. 294-296.

Following a two-day jury trial, the jury found that petitioner had discriminated against Nozick based on her age, and that it had done so willfully. Pet. App. 6a. The jury awarded back pay, and the court awarded an equal

amount in liquidated damages, as required by the ADEA in cases of willful discrimination. *Ibid.* The court also awarded front pay and attorneys' fees, and denied the respondent's requested injunction. *Id.* at 14a-15a.

2. The court of appeals affirmed. Pet. App. 1a-13a. It held that the statements of Cearnal and Armistead were properly admitted in evidence as non-hearsay admissions of a party opponent under Federal Rule of Evidence 801(d)(2)(D). Pet. App. 7a-12a. Both declarants were limited agents of petitioner, the court held, because they each "were significantly involved in assisting [petitioner's] Board of Directors" to reorganize the Racquet Club and change its staff. Cearnal was "at all critical times a ubiquitous actor in the overall process that led eventually and inexorably to the decision to remove Nozick," *Id.* at 8a, and he was "the only resident member of the three-person Interview Committee" in the "most critical stage" of that process. *Id.* at 9a. Armistead was a resident member of the Recreation Committee that first expressed "resident concern about Nozick's performance as [Racquet Club] Director," and provided the initial impetus behind the reorganization. *Ibid.*[1]

The court of appeals also upheld the jury's determination that petitioner's ADEA violation was willful, entitling Nozick to liquidated damages. The court contrasted an employer's erroneous but good-faith conclusion that an age-based decision was lawful with that of an employer who acts willfully by "pretend[ing]

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[1] Because the court of appeals held the Cearnal and Armistead statements admissible under Federal Rule of Evidence 801(d)(2)(D), it did not address respondent's alternative contentions that the statements were admissible for impeachment or to reveal the declarants' state of mind. Pet. App. 7a-8a.

that a decision was not age-based when in fact it was." Pet. App. 12a, citing *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1709-1710 (1993). "[T]he evidence here clearly sufficed" under this standard. Pet. App. 13a. Although petitioner denied that the decision was age-based, "[t]he jury, presented with the properly admitted statements of Cearnal and Armistead suggesting otherwise and faced with [petitioner's] failure to offer any other credible explanation for Nozick's firing, had sufficient evidence before it to find the violation a 'willful' one." *Ibid.*

ARGUMENT

Petitioner asserts that liability under the Age Discrimination in Employment Act cannot be "based on allegedly discriminatory statements of persons who are limited agents of the employer but not the ultimate decisionmakers * * * when those statements were not communicated to or known by the ultimate decisionmakers." Pet. i. The court of appeals held, however, that the jury's verdict was fully supported by competent evidence. That decision is correct and does not conflict with any decision of any other court of appeals.

1. Petitioner now acknowledges that David Cearnal and Jack Armistead were petitioner's limited agents for purposes of the disputed employment decision. Pet. i. Petitioner thus abandons the only ground upon which it challenged the liability determination on appeal. See Pet. C.A. Br. 17-28. Petitioner also expressly "does not seek review in this Court of the finding of willfulness." Pet. 8 n.3. This concession alone suffices to render immaterial any challenge to the sufficiency of the evidence, or to the admission of particular statements showing age-based intent. In all events, the evidence amply supported the jury verdict. Indeed, petitioner

admitted as much in the court of appeals, where it challenged the admission of the Cearnal and Armistead statements under Federal Rule of Evidence 801(d)(2)(D), but did "not challenge[] the sufficiency of the statements to prove the discriminatory motive alleged." Pet. App. 10a.

2. Contrary to petitioner's suggestion, see Pet. i, 8, 17, there is no requirement under the ADEA that a jury verdict be supported by direct evidence of the motive of the ultimate decisionmakers. Circumstantial evidence alone is enough to support a jury finding of intentional discrimination. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2749 & n.4 (1993). Direct evidence of discriminatory motives on the part of an employer's agents, although not required, is admissible and highly probative. *Ibid.*; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).[2]

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[2] Petitioner's contention that *Price Waterhouse* requires "direct evidence" of discrimination by the ultimate decisionmaker, Pet. 8-9, is incorrect. This Court held that the discriminatory statements in *Price Waterhouse* were sufficient to establish that gender had been a motivating cause of the decision, notwithstanding that the vast majority of the statements at issue there were made by individuals other than the ultimate decisionmakers. 490 U.S. at 257 (plurality opinion) (considering biased comments that "were made by 'persons outside the decisionmaking chain'" because to do otherwise would "ignore[] the critical role that partners' comments played in the Policy Board's partnership decisions"); *id.* at 272 (O'Connor, J, concurring in the judgment) (noting that statements properly "given 'great weight' by the decisionmakers" were not made by the decisionmakers themselves). Moreover, the principal holding of *Price Waterhouse* regarding burdens of proof in "mixed

The jury verdict in this case was fully supported by the record. The court of appeals correctly held that the statements of Cearnal and Armistead were probative of petitioner's motives, and were admissible.[3] Contrary to petitioner's suggestion, the jury verdict did not rest on those statements alone. The evidence also included comments by Reorganization Committee member and Tennis Committee chairman William Volmer that he would like to see "someone younger" in charge of the Racquet Club. The jury properly could have concluded that these participants brought illegal motives to bear directly on the process, for example in recommending the abolition of Nozick's job and, in Cearnal's case, in rating her unfavorably as a candidate. The active involvement of all of these individuals in the events leading up to Nozick's discharge, together with the other evidence of record, also could have supported an inference that their motives were in fact known to and taken into account by the General Manager or the Board when the final decision was made.

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motive" cases is inapplicable to this case, which was never litigated by either party as a case involving a combination of legitimate and illegitimate motives.

[3] See, *e.g.*, *EEOC* v. *Manville Sales Corp.*, 27 F.3d 1089 (5th Cir. 1994) (holding age-related remarks probative and admissible in ADEA suit even though supervisor who made remarks did not make discharge decision); *Zaken* v. *Boerer*, 964 F.2d 1319, 1323 (2d Cir.) (holding remarks reflecting discriminatory motive for discharge probative and admissible where declarant was not final decisionmaker but "took part in personnel decisions regarding hiring and firing"), cert. denied, 113 S. Ct. 467 (1992); *Jardien* v. *Winston Network, Inc.*, 888 F.2d 1151, 1155 (7th Cir. 1989) (holding age-related remarks by non-decisionmaker admissible because "a jury could reasonably conclude that [decisionmaker] accepted [declarant's] input" in making discharge decision).

Moreover, petitioner's assertion that it did not hire Nozick in the "new" Manager job only because she refused to accept restrictions on her use of Club facilities on her own time, Pet. 4, was patently pretextual. The Board knew when it adopted the restriction that it affected only Nozick, who was the only candidate who was also a resident and therefore otherwise entitled to Club privileges. Although Nozick was warned of the restriction early in the interview process and ostensibly not offered the job because of it, the other, younger candidates testified that they were never informed during interviews of any such restriction. Most importantly, Nozick was never even asked whether she would have accepted it. The procedural irregularity of offering the position to Vicky Paulson, who had not been interviewed, provided additional support for an inference of unlawful motive. See generally *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (noting that "[d]epartures from the normal procedural sequence" may be evidence of illegal motive).

Petitioner's contention that "liability cannot be predicated upon the actions of someone who is not the ultimate decisionmaker or official policymaker with respect to the subject matter in question," Pet. 8, relies on erroneous application to an ADEA claim of legal standards unique to claims under 42 U.S.C. 1983. "[A] local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents." *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 694 (1978). Only if injury is inflicted by persons whose conduct amounts to a municipality's "official policy" can the government entity be liable under Section 1983 for damages. Decisions by persons who are "ultimate decisionmakers" with respect to challenged

conduct are deemed under Section 1983 to be "official policy." See, *e.g.*, *Pembaur* v. *Cincinnati*, 475 U.S. 469 (1986). The question who is the "ultimate decision-maker" on "official policy" is, however, a concern limited to suits against municipalities for damages under Section 1983. It has no significance under the ADEA, where liability may be based on the conduct of an employer's agents. 29 U.S.C. 630(b)(1). Petitioner's reliance on *Pembaur* and *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), Pet. 8-10, 18, is thus misplaced.

3. There is no circuit conflict on the issues presented by the petition; the court of appeals correctly distinguished the assertedly conflicting decisions upon which petitioner relies. Pet. App. 9a-11a. Several of those decisions held that particular statements suggesting bias, the admissibility of which was not contested, "were not sufficient, because of their stray or vague character or the complete noninvolvement of their maker in the relevant decisional process, to prove the claimed discrimination or to withstand summary judgment." *Id.* at 9a. Other decisions petitioner cites held that statements suggesting bias were inadmissible because of the declarant's "noninvolvement in the relevant decisionmaking process." *Id.* at 10a. None of those cases employs an evidentiary standard which, if applied to this case, would have required a result contrary to the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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